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MAY 13 1981
ALEXANDER L. STEVAS,
CLERK

CASE NO. 80-1942

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

A. R. JAGO AND WILLIAM J. BROWN,
Petitioners,

vs.

GEORGE D. VAN CUREN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE OBTAINING OF AN AUTHORIZATION FOR PAROLE CREATES A NON RESCINDABLE PROPERTY RIGHT TO PAROLE RELEASE WITHOUT PROCEDURAL DUE PROCESS WHERE STATE LAW, AS HELD BY THE SUPREME COURT OF SUCH STATE, CONSTRUES SUCH AUTHORIZATION AS CONDITIONAL SUBJECT TO FURTHER INVESTIGATION AND WHERE THE CONDITIONAL AUTHORIZATION HAS BEEN OBTAINED BY FRAUD.

II. WHETHER A PETITION FOR WRIT OF HABEAS CORPUS SEEKING A PAROLE IS MOOT WHEN DURING THE COURSE OF THE PROCEEDINGS THE INMATE IS PAROLED NOT AS A RESULT OF ANY COURT ACTION.

PARTIES

The petitioners in this action are A. R. Jago, former Superintendent of the Southern Ohio Correctional Facility, currently Superintendent of the London Correctional Institution and William J. Brown, Attorney General of Ohio. The respondent is George D. Van Curen.

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DECISIONS BELOW

The decision of the Ohio Supreme Court denying respondent a writ of mandamus is reported at 45 Ohio St. 2d 298 (1976) and appears in the Appendix hereto (40 A).

The decision of this Court denying a writ of certorari is reported at 429 U.S. 959 (1976) and appears in the Appendix hereto (39 A).

The initial decision of the United States District Court for the Southern District of Ohio, Western Division and the Report of the Magistrate are unreported and appear in the Appendix hereto (32 A, 33 A).

The initial decision of the United States Court of Appeals for the Sixth Circuit is unreported and appears in the Appendix hereto (30 A).

The order of this Court granting respondent's petition for a writ of certiorari, vacating the earlier judgement of the United States Court of Appeals for the Sixth Circuit and remanding the case to that court for further consideration is reported at 442 U.S. 926 (1979) and appears in the Appendix hereto (29 A).

The order of the Court of Appeals for the Sixth Circuit remanding the case to the United States District Court for the Southern District of Ohio, Western Division is unreported and appears in the Appendix hereto (27 A).

The most recent decision of the United States District Court for the Southern District of Ohio, Western Division which is unreported appears in the Appendix hereto (18 A).

The most recent decision of the United States Court of Appeals for the Sixth Circuit, is reported at 641 F. 2d 411 (1981) and appears in the Appendix hereto (3 A).

The decision of the United States Court of Appeals for the Sixth Circuit denying petitioner's request for a rehearing en banc is unreported and appears in the Appendix hereto (17 A).

The decision of the United States Court of Appeals for the Sixth Circuit staying the mandate is unreported and appears in the Appendix hereto (16 A).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on February 10, 1981. Rehearing was denied on March 26, 1981. The order staying the mandate was issued on April 14, 1981. Jurisdiction is conferred by 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment.

> Section 1 *** [N] or shall any state deprive any person of life, or property, without due process of law; ***.

Section 2967.01 of the Ohio Revised Code.

> "Parole" means the release from confinement in any state penal or reformatory institution by the adult parole authority created by section 5149.02 of the Revised Code and under such terms and for such period of time as shall be prescribed by the authority in its published rules and official minutes. A parolee so released shall be supervised by the authority.
>
> * * *

Section 2967.31 of the Ohio Revised Code.

> Notwithstanding any other provision for determining parole eligibility, a prisoner confined in a state penal or reformatory institution may be released on

parole at any time after serving six months in the custody of the department of rehabilitation and correction, when all of the following apply:

(A) The offense for which the prisoner was sentenced was an offense other than aggravated murder or murder.

(B) The prisoner has not previously been convicted of any felony for which, pursuant to sentence, he was confined for thirty days or more in a penal or reformatory institution in this state or in a similar institution in any other state or the United States.

(C) The prisoner is not a dangerous offender as defined in section 2929.01 of the Revised Code.

(D) The prisoner does not need further confinement in a penal or reformatory institution for his correction or rehabilitation.

(E) The history, character, condition, and attitudes of the prisoner indicate that he is likely to respond affirmatively to early release on parole, and is unlikely to commit another offense.

CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

A. R. JAGO AND WILLIAM J. BROWN,

Petitioners,

vs.

GEORGE D. VAN CUREN,

Respondent.

STATEMENT OF THE CASE

After entering a plea of guilty to enbezzlement, forgery and uttering and passing charges, respondent (hereinafter Van Curen) was sentenced by the Cuyahoga County (Ohio) Court of Common Pleas to a term of incarceration of not less than six (6) nor more than one hundred (100) years. Under the sentence imposed Van Curen's first parole review date would have been March, 1976. However, on January 1, 1974 Ohio's "shock parole" statute, Section 2967.31, Ohio Revised Code, was enacted and Van Curen became eligible for consideration for early parole under the provision of that statute. Criteria established by O.R.C. § 2967.31 parallel those used in regular parole determinations: nature of offense; pattern of criminality; institutional record as to discipline, work, performance and self-improvement programming; community interest; parole plan and psychological or physical factors. As a first offender who had served nearly two years in custody for non-violent crimes, Mr. Van Curen was eligible for shock parole review.

On April 17, 1974, a panel consisting of one parole board member and a hearing officer interviewed Mr. Van Curen at the London Correctional Institution. The panel recommended that Van Curen be granted parole on or after April 23, 1974, and the Ohio Adult Parole Authority (hereinafter OAPA) approved that recommendation.

Upon receipt of information that Van Curen had not been truthful when he indicated he would be residing with a relative if paroled and that Van Curen had misrepresented the magnitude of his crime, the OAPA on April 23, 1974, rescinded the initial granted parole authorization on April 17, 1974 and voted to continue the case until June, 1974 for further investigation and a complete report.

On June 20, 1974 the parole board met at London Correctional Institution (Ohio) to conduct a hearing of Van Curen's application for shock parole. Based upon all the facts presented to the OAPA, the Board voted unanimously to deny Van Curen's request for parole.

On September 27, 1974 Van Curen initiated an original action in mandamus in the Supreme Court of Ohio challenging, on due process grounds, the rescission of his parole. The writ was denied. *State ex rel. Van Curen v. Ohio Adult Parole Authority*, 45 Ohio St. 2d 298 (1976) (40 A). This court denied a petition for a writ of certiorari on November 15, 1976. *Van Curen v. OAPA*, No. 75-6955 (U.S., filed June, 1976) (39 A).

On February 14, 1977 Van Curen filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Ohio, Western Division. On August 1, 1977 Judge Porter referred the case to a magistrate who filed a report on August 24, 1977 (33 A). Judge Porter adopted the Magistrate's Report and denied the Petition for Writ of Habeas Corpus (32 A). That decision was affirmed by the United States Court of Appeals for the Sixth Circuit on June 21, 1978 (30 A).

On June 11, 1979 this Court granted a petition for writ of certiorari, vacated the judgment, and remanded the case to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. 1 (1979) (29 A). The Sixth Circuit, on August 8, 1979, then remanded the case to the District Court (27 A) which on March 27, 1980 issued a Memorandum and Order again overruling the Petition for Writ of Habeas Corpus (18 A).

On February 10, 1981 the United States Court of Appeals for the Sixth Circuit reversed the decision of the District Court (3 A).

On March 26, 1981 the United States District Court for the Southern District of Ohio, Western Division denied petitioner's request for rehearing en banc (17 A).

On April 14, 1981 the United States Court of Appeals for the Sixth Circuit issued an order staying the mandate pending an application to this Court for a writ of certiorari (16 A).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The instant case presents an important issue of constitutional law regarding rescission of a parole authorization prior to its becoming effective, an action authorized by state law, as construed by the Supreme Court of Ohio. The majority decision of the United States Court of Appeals for the Sixth Circuit found that "Van Curen had a liberty interest which was based upon a mutually explicit understanding" following his grant of a shock parole "on or after April 23, 1974, when arranged by the Division of Parole."[1]

The majority below made this finding despite the fact Van Curen had procured the tentative grant of parole by fraud and deceit and in the face of state law which clearly held that Ohio Parole Board may rescind the granting of a parole prior to its taking effect. *Zenz v. Alvis*, 66 Ohio L. Abs. 606 (Ohio Appeals, 2nd District, 1951); *State ex rel. Newman v. Lowery*, 61 Ohio L. Abs. 337, aff'd., 157 O.S. 463 (1952); *State ex rel. Van Curen v. Adult Parole Authority*, 45 Ohio St. 2d 298 (1976). Indeed in Ohio there is no parole until one is actually released from confinement, *State ex rel. Newman v. Lowery, supra.*

The majority reasoned that since Van Curen was notified that he "had been paroled" and that the "Board is ordering a parole release in your case" he had a legitimate expectation that his early release would be effected. The Court went on to find that this expectation constituted a liberty interest (whose) deprivation would amount to a grievous loss.

Petitioners respectfully submit this is an incorrect

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[1] "Parole on or after" is issued in granting a parole in Ohio since any grant of parole is conditional pending approval and investigation of the parole plan submitted by the inmate (33 A).

analysis of the facts, this Court's prior decisions and well-settled Ohio law.

It is impossible under the facts of this case to find that Van Curen had any expectation of parole. He misled the panel that saw him concerning the magnitude of his crime. The amount which was embezzled was closer to six million dollars ($6,000,000) than the one million dollars ($1,000,000) he had admitted to before the panel (5 A, 34 A).

Secondly, Van Curen falsely stated that if released he would be living with his half brother. The truth in this case was Van Curen's sponsor was not a family member. Van Curen eventually admitted that his sponsor had been his homosexual lover.

Given these unquestioned falsehoods Van Curen had no expectation of release from confinement. At best, he possessed a hope or desire that his lies would go undetected. This is not an example of "mutually explicit understanding" as defined by this Court in *Perry v. Sindermann*, 408 U.S. 593 (1972).

Assuming arguendo that Van Curen had not been untruthful, there still exists no protectable liberty or property interest in the case at bar. This Court stated in *Board of Regents v. Roth*, 408 U.S. 564 (1972):

> Certain attributes of "property" interests protected by procedural due process emerge from [Supreme Court] decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation for it. He must, instead, have a legitimate claim of entitlement to it.

The majority concluded that Van Curen's "hope for parole has ripened into a 'legitimate claim of entitlement'"

because the Parole Board told him he would have a parole on or after a certain date. This however is a decision the majority recognized to be purley discretionary and a decision in which the inmate has no constitutionally protected interests. *Wagner v. Gilligan*, 609 F. 2d 866 (6th Cir. 1979).

Petitioner submits that an analysis of this Court's decisions produce the opposite result. In *Perry v. Sindermann*, *supra* relied upon by the majority, a nontenured college professor had an interest in employment based upon a *de facto* tenure program and that interest was protectable. The interest sprang from the rules and guidelines created by the college and the respondent's relience upon them. However, this case did not involve the question of state law and its interpretation by the state's highest court.

In *Bishop v. Wood*, 426 U.S. 341 (1976) this Court found thaht a policeman classified as a permanent employee could be dismissed despite his claim that a city ordinance provided that permanent employees could only be dismissed under certain circumstances and that ordinance therefore created a protected right of continued employment.

Specifically this Court held:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee . . . . Whether

> such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question. 426 U.S. at 341.

Therefore, Van Curen must look to Ohio law to find his protected interest. Petitioners assert that Ohio law is clear and cannot be disputed; parole may be rescinded without a hearing anytime before actual release. *State ex rel. Van Curen v. Ohio Adult Parole Authority, supra.* The dissent in the appellate court as well as the district court properly came to this conclusion after finding that Ohio law did not create a protected interest as the state statutes did in *Greenholtz v. Inmates of the Nebraska Penal Complex, supra.* The majority decision to the contrary ignores unambiguous state law and creates a constitutional right where none can exist and thereby rewards Van Curen's fraudulent actions.

There exists also a second reason why a writ of certiorari should be granted in this case. Petitioners assert here as they did before the appellate court below that the action is moot. Van Curen brought this action via a petition for a writ of habeas corpus. Prior to argument he was placed on parole (the relief he had sought in his petition) but had not yet been given his final release.

In *Weinstein v. Bradford,* 423 U.S. 147 (1975) an inmate claimed he was entitled to certain procedural rights in connection with his parole eligibility. During the course of the litigation he was paroled and eventually given his final release from parole. The action was found moot because it did not present an issue "capable of repetition, yet evading review" and there was no demonstration that the inmate would again be subject to the parole system.

This is precisely the case before the Court. Van Curen has obtained his relief. The appellate court in its decision has not instructed the district court to grant relief - it would be futile. A controversy must continue throughout

the litigation. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Here the controversy is at an end. Van Curen cannot say the question is "capable of repition yet evading review" as to him unless he is willing to speculate that his parole will be revoked or he is incarcerated in Ohio for a new conviction and once again brought before the Parole Board, granted a conditional parole, and then have the grant rescinded. Certainly there is no demonstrated probability that Van Curen will be subject to the above described action. This action was and is moot. *O 'Shea v. Littleton*, 414 U.S. 488 (1974); *Sosna v. Iowa*, 419 U.S. 393 (1975).

The end result of the majority decision is to encumber the parole process in Ohio with "burdensome and unwarranted" procedures that are not mandated by the Constitution. As this Court noted in *Greenholtz, supra*, such a practice should be avoided in order to encourage state experimentation with parole and not force states to "abandon or curtail parole". As noted above, all of this is being accomplished in an action which is moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition For Writ Of Certiorari have been served on respondent George D. Van Curen, 2112 W. 98th Street, Cleveland, Ohio by forwarding such copies through the office of his counsel, Louis A. Jacobs, The Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio 43210, by United States mail, postpaid, this day of May, 1981. I further certify that all parties required to be served have been so served.

DENNIS L. SIPE
Counsel of Record
Assistant Attorney General

APPENDIX

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Opinion, February 10, 1981, United States Court of Appeals for the Sixth Circuit, *Van Curen v. Jago, et al.*, No. 80-3351 (6th Cir. 1981), reversing district court 3A

Order, April 14, 1981, United States Court of Appeals for the Sixth Circuit, staying mandate 16A

Order, March 25, 1981, United States Court of Appeals for the Sixth Circuit, denying petition for rehearing 17A

Memorandum and Order, March 27, 1981, United States District Court for the Southern District of Ohio, Western Division, overruling petition for writ of habeas corpus 18A

Order, August 8, 1979, United States Court of Appeals for the Sixth Circuit, remanding the action to the United States District Court for the Southern District of Ohio, Western Division for further consideration 27A

Order, 442 U.S. 926 (June 11, 1979) Supreme Court of the United States, granting leave to proceed in forma pauperis, the petition for a writ of certiorari and remanding the case to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Greenholtz v. Inmates of the Nebraska Penal Complex*, 442 U.S. 1 (1979) 29A

Order, June 21, 1978, United States Court of Appeals for the Sixth Circuit, affirming the judgment of the United States District Court for the Southern District of Ohio, Western Division 30A

Order, August 24, 1977, United States District Court for the Southern District of Ohio, Western Division,

approving and adopting the report of the Magistrate and denying the petition for writ of habeas corpus 32A
Report of Magistrate, August 24, 1977, United States District Court for the Southern District of Ohio, Western Division, recommending the denial of the petition for writ of habeas corpus 33A
Order, November 15, 1976, Supreme Court of the United States, denying the petition for writ of certiorari to the Supreme Court of Ohio 39A
Opinion, *State ex rel Van Curen v. Adult Parole Authority*, 45 Ohio St. 2d 298 (1976), Supreme Court of Ohio, denying writ of mandamus 40A

No. 80-3351

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE D. VAN CUREN,
Petitioner-Appellant,

v.

A. R. JAGO and
WILILIAM J. BROWN,
Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Decided and Filed February 10, 1981.

Before: LIVELY and KEITH, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

LIVELY, Circuit Judge, delivered the opinion of the Court in which KEITH, Circuit Judge, joined. PHILLIPS, Senior Circuit Judge, (pp. 11-12) delivered a separate dissenting opinion.

LIVELY, Circuit Judge. In deciding this appeal we determine what due process requirements must be met before a state parole authority may rescind its action granting parole to an inmate effective at a future date. The district court held that the petitioner, an inmate of an Ohio correctional facility, "had no constitutionally protectable expectation in early release, even under the unusual circumstances presented by this case." We reverse for the reasons hereafter set forth.

The facts are not in dispute. Van Curen was sentenced to not less than six nor more than 100 years incarceration on a

guilty plea to two counts of embezzlement, four counts of forgery, three counts of uttering and publishing forged instruments and one count of obtaining money by false pretense. Under existing law he would have first become eligible for parole in March 1976. However, effective January 1, 1974, Ohio enacted a "shock parole" statute, Ohio Revised Code §2967.31.[1] On April 17, 1974 a panel of the Ohio Adult Parole Authority (the OAPA or the Board) interviewed Van Curen and recommended that he be granted shock parole "on or after April 23, 1974, when arranged by the Division of Parole." The OAPA approved the panel's recommendation incorporating it in the minutes of its regular meeting. Van Curen was given immediate notice of the decision and a "Statement of Parole Agreement" which he signed, acknowledging that he understood the conditions of parole and that he agreed to observe and abide by them. The opening sentences of this statement were, "The Members of the Parole Board have agreed that you have earned the opportunity of parole and eventually a final release from your present conviction. The Parole Board is therefore ordering a Parole Release in your case." Van Curen attended

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[1]**§2967.31 Shock parole.**

Notwithstanding any other provision for determining parole eligibility, a prisoner confined in a state penal or reformatory institution may be released on parole at any time after serving six months in the custody of the department of mental hygiene and correction, when all of the following apply:

(A) The offense for which the prisoner was sentenced was an offense other than aggravated murder or murder.

(B) The prisoner has not previously been convicted of any felony for which, pursuant to sentence, he was confined for thirty days or more in a penal or reformatory institution in this state or in a similar institution in any other state or the United States.

(C) The prisoner is not a dangerous offender as defined in section 2929.01 of the Revised Code.

(D) The prisoner does not need further confinement in a penal or reformatory institution for his correctin or rehabilitation.

(E) The history, character, condition, and attitudes of the prisoner indicate that he is likely to respond affirmatively to early release on parole, and is unlikely to commit another offense.

and completed pre-release classes and was measured for civilian clothes.

At an April 23, 1974 meeting of the OAPA "special minutes" were adopted in which the Board rescinded its earlier grant of parole to Van Curen and continued his case to the June 1974 meeting. On June 20, 1974 parole was denied after a hearing. Van Curen brought a mandamus action against the OAPA. In that action the Supreme Court of Ohio held that no hearing was required for the parole authority to rescind an order granting parole at a future date where rescission occurred before release from confinement. *State ex rel. Van Curen v. Adult Parole Authority*, 45 Ohio St. 2d 298 (1976). The Supreme Court of the United States denied an application for certiorari. 429 U.S. 959 (1976). Van Curen then filed a petition for a writ of habeas corpus, which the district court denied. On appeal this court affirmed without opinion. 578 F. 2d 1382 (1978). The Supreme Court granted certiorari, vacated the judgment and remanded the case to this court "for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex* [442 U.S. 1 (1979)]...." 442 U.S. 926 (1979). This court then remanded to the district court for "determination of whether petitioner, under the peculiar facts of this case, had a protectable entitlement to release under the Ohio shock parole statute, O.R.C. §2967.31; and if such interest did exist, whether he was accorded adequate procedural due process safeguards."

Upon remand the district court found that Van Curen's grant of parole was rescinded because the OAPA received information that he had not been truthful before the panel or in his parole plan.[2] Van Curen was given no opportunity to be heard on the truthfulness of this information or to explain

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[2]The evidence at the habeas corpus hearing disclosed that the Board had unverified information that Van Curen had embezzled $6,000,000 rather than $1,000,000 as he had stated in his interview. The Board also had informatin that, contrary to Van Curen's statement in his parole plan, the person with whom he planned to live after release was not a relative.

it before rescission. The district court concluded that under Ohio law there is no protectable interest in early release from imprisonment until release actually occurs. Since early release is entirely a matter of grace, a grant of parole may be revoked without a hearing at any time prior to release. The court treated the expectation of parole as a mere desire or hope for release and contrasted it with the expectation of continued liberty of one already released on parole.

At oral argument it was suggested by the respondent that this case is moot in view of the fact that Van Curen has now been paroled. Principal reliance for this contention rests on the decision of the Supreme Court in *Weinstein v. Bradford*, 423 U.S. 147 (1975), where an action against a parole authority was held to be moot when the inmate was paroled. However, the fact which created mootness was not the inmate's release. Rather, the case became moot when this status "ripened into a complete release from supervision...." *Id.* at 148. Since Van Curen remains under the supervision of the OAPA the present case is not controlled by *Weinstein*. We conclude that mootness has not been established and that the important constitutional issue presented by this appeal should be decided at this time.

Parole for Ohio prisoners lies wholly within the discretion of the OAPA. The statutes which provide for parole do not create a protected liberty interest for due process purposes. *Sharp v. Leonard*, 611 F. 2d 136 (6th Cir. 1979); *Wagner v. Gilligan*, (609 F. 2d 866 (6th Cir. 1979); *State ex rel. Newman v. Lowery*, 157 Ohio St. 463, *cert. denied*, 344 U.S. 881 (1952). Referring to Ohio's general parole statute, which does not differ in this respect from its shock parole statute, this court stated in *Wagner v. Gilligan*, *supra* at 867, "The statute does not mandate a presumption of parole release and, therefore, does not create a protected statutory entitlement to parole on which appellees can ground their due process claim." Thus, the present case may be distinguished from *Greenholtz*, *supra*, where the Supreme

Court found that the Nebraska parole statute which mandates release in the absence of certain conditions is "unique in structure and language." 442 U.S. at 12. The expectancy of release provided by the Nebraska statute was found to be entitled to "some measure of constitutional protection." *Id.*

Petitioner concedes that the Ohio statute provides only a possibility of parole which creates no reasonable expectation of early release. However, he argues that once a parole determination has been made its rescission is more like a revocation of parole than an original parole determination. The Supreme Court held in *Morrisey v. Brewer*, 408 U.S. 471 (1972), that certain procedural requirements must be met before parole may be revoked. Petitioner argues that the same due process requirements should have been met in the present case. Petitioner points out that he had far more than a mere desire for release. He had been told that he had "earned the opportunity of parole and eventually a final release," that the parole board was "ordering a Parole Release in your case," and he had signed the statement of parole agreement. He argues that he had acquired a protected interest in a parole which had been granted but had not yet taken effect; it was not necessary that he be released before his interest in parole became entitled to constitutional protections. The rescission was based on a determination that he had falsified information, a question of fact upon which he was entitled to notice and a hearing.

Petitioner also argues that his expectancy of early release was based on past practice and custom of the OAPA. The person who was chairman of the OAPA when petitioner's parole determination was rescinded testified by deposition that the Board rescinded approximately 25 or 30 paroles of the six to ten thousand granted each year during his three year term. Since more than 99 percent of Ohio inmates who are granted parole are actually released without having their paroles rescinded, petitioner contends he had a justifiable

expectation of release based on state custom and practice. This expectation is a "liberty" interest which the state may not take away without observing procedural due process requirements, he asserts, citing *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Board of Regents v. Roth*, 408 U.S. 564 (1972).

The respondents argue that since the Ohio statute so clearly creates no legitimate expectancy of early release the district court properly denied habeas corpus relief. Responding to petitioner's argument, the respondents assert that *Morrissey v. Brewer, supra*, which dealt with revocation of parole after release, is not controlling. Two distinctions are noted between parole rescission and parole revocation: (1) parole revocation deprives the parolee of a liberty already obtained while rescission at most denies a conditional liberty merely desired; (2) revocation depends on a retrospective factual determination with the attendant risk of error in the absence of a hearing while rescission remains a purely subjective determination. Under Ohio law, O.R.C. §2967.01 (E), parole is defined as release from confinement by the OAPA. Until the time of release, respondents contend, an inmate has nothing more than a hope, certainly not an entitlement to an early end to incarceration. Even if a hearing were held prior to rescission of a parole determination, no set of facts could be established which would require release under Ohio law. That decision, unlike the one at issue in *Greenholtz*, remains purely discretionary.

Our previous judgment was vacated and remanded for reconsideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex, supra*. Though *Greenholtz* was decided on the basis of a particular statute, the Court's opinion deals more generally with the criteria for entitlement to due process in the parole setting. To determine whether the due process clause applies a court must inquire into the nature of the interest which is affected by government action. The Constitution is not implicated where a state deprives a

person of something for which he has not more than an abstract need or desire, or a unilateral expectation. "He must, instead, have a legitimate claim of entitlement to it." 442 U.S. at 7. Applying these principles to parole, the *Greenholtz* Court held that a state law which holds out the mere possibility of parole provides no more than a hope for early release and creates no liberty interest within the meaning of the due process clause.

In reaching this conclusion the Court noted the differences between a purely discretionary decision to grant parole and a fact-related determination to revoke parole once granted. An obvious difference is that the already paroled individual is enjoying the relative freedom of the "outside" while an applicant for parole is incarcerated. A second difference lies in the nature of the decision to be made in each case. In parole revocation the first decision is whether the parolee has actually violated the terms of parole. This is a "wholly retrospective factual question," *id.* at 9, involving none of the predictive judgments involved in an initial parole determination. On the other hand, the initial parole-release decision "is more subtle and depends on an amalgram of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release." *Id.* at 9-10. Thus, *Morrissey v. Brewer, supra,* does not control the parole-release decision where a state authority has unfettered discretion.

It is not the parole-release decision which petitioner questions, however. It is the action of the Board which rescinded a previous grant of parole. Is parole rescission more like the grant of a parole or more like a parole revocation? It clearly contains elements of both. Since the inmate has not yet been released, the parole authority is still engaged to a certain extent in a subjective and predictive determination. Nevertheless, the same authority has

previously made the "more subtle" decision in favor of release and the decision to rescind must necessarily depend, at least to some extent, on a "retrospective factual determination." We do not believe that the nature of the decisions involved in parole rescission places such determinations clearly within the ambit of either revocation or initial release. Rather it is necessary to determine in each case whether an inmate's hope for parole has ripened into a "legitimate claim of entitlement."

It seems clear to this court that Van Curen had a great deal more than an abstract desire or unilateral expectation of early release. In *Perry v. Sindermann, supra,* the Supreme Court found a legitimate claim of entitlement on the basis of state rules or "mutually explicit understandings." 408 U.S. at 601. A nontenured professor at a public university was held entitled to a hearing on the university's decision not to renew his contract after 10 years in the state system. The university had no tenure policy, but fostered an understanding that there would be job security after seven years of teaching. In *Bills v. Henderson,* ——F. 2d.—— (6th Cir. No. 78-1172, decided October 1, 1980), this court found that a prison's guidelines for administrative segregation created a legitimate claim of entitlement to freedom from such segregation. Notice and a meaningful hearing are required before a person may be removed from the general prison population and placed in administrative segregation. The court specifically recognized that "[l]iberty interests can be created by state rules or mutually explicit understandings as well as by statute." (Slip op. at 3). *Compare Durso v. Rowe,* 579 F. 2d 1365, 1369 (7th Cir. 1978).

Upon consideration of the entire record this court concludes that Van Curen had a liberty interest which was based upon a mutually explicit understanding. Having been notified that he "ha[d] been paroled" and that "the Board is ordering a Parole Release in your case," he had a legitimate expectation that his early release would be effected. This

expectation was a liberty interest, the deprivation of which would indeed constitute a grievous loss. It was an interest which could not be taken from him without according petitioner procedural due process.

We do not reach this conclusion on the basis of cases from jurisdictions which have rules or guidelines that establish entitlement to parole or permit rescission under narrowly defined circumstances. *E.g., Christopher v. U.S. Board of Parole*, 589 F. 2d 924 (7th Cir. 1978); *Drayton v. McCall*, 584 F. 2d 1208 (2d Cir. 1978); *but see, Sexton v. Wise*, 494 F. 2d 1176 (5th Cir. 1974), (all cases involving parole of federal prisoners). There is no evidence that Ohio has such rules or guidelines. Nor do we base our decision on the evidence that less than one percent of Ohio's parole grants are rescinded. *Cf. Dumschat v. Board of Pardons*, 618 F. 2d 216 (2d Cir.), *cert. granted*, —— U.S. ——, 49 U.S.L.W. 3270 (1980). This evidence related to paroles generally and there was no proof directed specifically to shock parole, the comparatively new Ohio method of release involved in the present case. Rather, the decision is based on the facts of this case which lead ineluctably to the conclusion that acts of the OAPA created a protected liberty interest in Van Curen.

Having determined that due process safeguards were required in the present case, we now consider what process was due. The flexibility of the due process requirement has been stressed many times. What process is due depends on the nature of the interest involved. It seems clear that all the procedures prescribed for parole revocation in *Morrissey v. Brewer* are not required for rescission. A parole grantee who has not been released has not yet acquired a liberty which "includes many of the core values of unqualified liberty." *Morrissey*, 408 U.S. at 482. Rather, such a person, though still an inmate, has acquired a conditional liberty interest similar to that of the Nebraska inmates in *Greenholtz*.

The uncontradicted evidence showed that the OAPA has no further role in parole release after its minutes are signed

approving a panel recommendation, unless the inmate is involved in "negative institutional conduct" or new disqualifying information is brought to light. A decision on either of these bases would be necessarily fact-related. We conclude that due process requires an opportunity for the parole grantee to be heard after reasonable notice of the Board's intention to consider rescission. The notice should state the reason for the decision to consider rescission, and should disclose the information on which the decision is based, though sources of the information need not be disclosed in the notice. This will enable the inmate to prepare for the hearing. At the hearing the inmate must be permitted to testify and to file affidavits and documentary evidence. The hearing will be held either by the OAPA or a panel thereof. If the Board rescinds parole it must state in writing the reasons for its action and the evidence relied upon, though formal findings of fact are not required.

These procedures will make the hearing meaningful and will provide protection from arbitrary actions. We believe they will serve the interests of the all parties, including society's "interest in treating the parolee with basic fairness: fair treatment...will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey v. Brewer*, 408 U.S. at 484.

The judgment of the district court is reversed.

PHILLIPS, Senior Circuit Judge. (Dissenting.) I respectfully dissent. I agree that the better practice would have been for the Ohio Adult Parole Authority to have conducted a hearing before rescinding Van Curen's contemplated parole. *See Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). However, I do not agree that the Fourteenth Amendment required such a hearing under the facts of this case.

In *Bishop v. Wood*, 426 U.S. 341, 344 (1976), the Supreme Court said: "[T]he sufficiency of a claim of entitlement must be decided by reference to state law." *Cf. Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1978).

Under Ohio law, Van Curen had "no claim of entitlement." The State Adult Parole Authority had the right, at any time before Van Curen was released, to rescind its previous action granting parole.

In *State ex rel. Newman v. Ohio Pardon and Parole Commission*, 157 Ohio St. 403, 464 (1952), *cert. denied*, 344 U.S. 881 (1953), the Supreme Court of Ohio said: "The question of parole of prisoners being in the discretion of the Pardon and Parole Commission, that commission had authority to rescind its order or March 9, 1950, granting a parole effective on or after a future date."

In *Morrissey v. Brewer, supra*, 408 U.S. 471, 481 (1972), which involved the revocation of parole after the release of the prisoner, and not, as in the present case, the rescission of an action by parole authorities before release, the Supreme Court said: "The question is...whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." The Court examined the nature of parole revocation and found that:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released

> from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked. (Footnotes omitted.) 408 U.S. at 482.

The emphasis of the foregoing quotation is upon the rights of the prisoner to a due process hearing before revocation of his parole after his release. Because of the difference between the nature of parole revocation and parole rescission, I do not agree with the majority opinion that Van Curen had a liberty interest within the meaning of the fourteenth amendment.

In *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 12 the Supreme Court said:

> [W]e emphasis that this [Nebraska] statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis.

The Ohio statute, quoted in footnote 1 of the majority opinion, is not the same as the Nebraska statute applied in

Greenholtz. As interpreted by the Supreme Court of Ohio, Van Curen did not, in my opinion, have a "legitimate claim of entitlement" to parole. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1971).

Therefore, I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 80-3351

GEORGE D. VAN CUREN,
Petitioner-Appellant,

vs.

A.R. JAGO AND WILLIAM J. BROWN,
Respondents-Appellees.

ORDER STAYING MANDATE

Filed April 14, 1981
John P. Hehman, Clerk

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ By Bernard Green
John D. Hehman, Clerk

No. 80-3351

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE VAN CUREN
Petitioner-Appellant

v.

A. R. JAGO, et al.
Respondents-Appellees.

ORDER

BEFORE: LIVELY and KEITH, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

No member of the court having requested rehearing en banc, the petition for rehearing filed herein by the respondents-appellees has been referred to the panel for disposition. Upon consideration, the court concludes that rehearing is not required. The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. C-1-77-67

GEORGE D. VAN CUREN

Petitioner,

vs.

ARNOLD R. JAGO, SUPT.,

Respondent.

MEMORANDUM AND ORDER

This is a habeas corpus case. Petitioner is George D. Van Curen, an inmate at the Southern Ohio Correctional Facility [SOCF], who seeks to set aside the rescission of his shock parole on the ground that the manner in which said rescission was effected violates Due Process.

The facts are largely uncontested, and may be summarized briefly. After pleading guilty to embezzlement, forgery, and uttering and passing forged instruments, petitioner was sentenced to a term of imprisonment of from six (6) to one hundred (100) years. In April of 1974, petitioner appeared before a two-man panel representing the parole board. This panel recommended to the parole board that petitioner be granted a shock parole pursuant to Ohio Revised Code [ORC] §2967.31. The full parole board approved the recommendation.

Subsequently, however, upon receipt of information that Van Curen had not been truthful to the panel and that he had not been truthful in his parole plan, the parole board rescinded the action taken, and voted to continue the case for further consideration. The board considered the case again in June, 1974, and denied the application for shock parole. It

is undisputed that petitioner was not given an opportunity to be heard on the truthfulness of his application and parole plan prior to the rescission of his parole. Said rescission was effected before his actual release.

Van Curen subsequently petitioned the Supreme Court of the State of Ohio for a writ of habeas corpus, and thereafter for a writ of mandamus. Both were denied. He then filed the within petition, which initially was denied upon the Report and Recommendation of United States Magistrate J. Vincent Aug, Jr. The Sixth Circuit affirmed, but the United States Supreme Court vacated the Circuit's decision and remanded the case for reconsideration in light of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* U.S. , 99 S. Ct. 2100 (1979). The Circuit, in turn, remanded to this Court and the case now is ripe for decision.[1]

This is a close case, and we feel compelled to observe that common sense suggests that Van Curen should have been given a chance to state his side of the story. Nevertheless, in view of the most recent pronouncements of the Supreme Court, we must find that such a hearing was not required by the Constitution.

The Supreme Court in *Greenholtz* identified two important differences between parole release and parole revocation, to which due process unquestionably applies, *Morrisey v. Brewer,* 408 U.S. 471 (1972). First, there is the obvious difference between being deprived of a liberty which one has, and being denied a conditional liberty that one merely desires. 99 S. Ct. at 2105. Second, the nature of the decision involved is different. "[T]he parole revocation determination actually requires two decisions: whether the parolee in fact acted in violation of one or more conditions of parole and whether the parolee should be recommitted either

[1]Van Curen has been represented in proceedings before this Court by law students participating in the Clinical Programs at the Ohio State University College of Law. We congratulate them on the quality of their legal memoranda.

for his or society's benefit." *Id., citing Morrissey v. Brewer,* 408 U.S. 471-479 (1972). The Court concluded:

> The parole release decision...is more subtle and depends on an amalgam of elements, some of which are factual, but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual.

99 S. Ct. at 479. As to the factual determination referred to above, the Court noted,

> The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. ...[T]he quantum and quality of the process due in a particular situation depends upon the need to serve the purpose of minimizing the risk of error.

Id. at 2106.

Thus, *Greenholtz* identifies two prerequisites that must be satisfied before due process guarantees an inmate a right to a hearing on early release. First, he must establish that state law gives rise to a protectable expectation of early release; and second, he must show that there is a risk of an erroneous factual determination if he is not given a hearing of some sort. [1]@ We find that in the present case, Van Curen had no

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[1]@We need not explore here whether there ever could be a situation in which an entitlement exists, but in which the benefit could be denied with absolutely no risk of factual error, even without a hearing. As a practical matter, the risk of error is considered in determining what process is due in a particular situation, rather than in deciding whether due process safeguards apply.

such protectable expectation.

We start here with the nature of the interest at stake. *Morrissey v. Brewer*, 408 U.S. at 481. The Supreme Court stated in *Board of Regents v. Roth*, 408 U.S. 564, (1972),

> Certain attributes of "property" interests protected by procedural due process emerge from [Supreme Court] decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

* * * *

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577. The Court also considered the kind of interests protected by procedural due process in *Perry v. Sindermann*, 408 U.S. 593 (1972), wherein it stated,

> We have made clear in *Roth*...that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings."...A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Id. at 601. Thus, in *Perry* the Court concluded that a nontenured college professor had a protectable interest in employment based on a *de facto* tenure program. *Id.* at 600. This program included an unusual provision in the college's official Faculty Guide which provided that "[t]he Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." *Id.*

Moreover, guidelines promulgated by the Coordinating Board of the state College and University System, upon which the respondent in *Perry* legitimately relied, provided that a person who had been employed as a teacher in the state college and university system for seven years or more (as the respondent had been) was entitled to "some form of job tenure." *Id.*

If Morrisey, Perry, and Roth represented the Supreme Court's last words on the subject, we might be more inclined to agree that the actions in this case, including the signing of Van Curen's parole agreement by an institutional officer, gave rise to a protectable expectation by Van Curen. Such an expansive reading of the state law entitlement concept would not be justified under later cases, however.

In *Bishop v. Wood*, 426 U.S. 341 (1976), petitioner was employed by the city of Marion, N.C. as a policeman, and was classified as a permanent employee. He was dismissed, however, and he sued on an alleged express or implied right to continued employment. The heart of the petitioner's case was a city ordinance which provided that a permanent employee could be discharged for failure to perform work up to the standard of his classification, for negligence or inefficiency, or if he became unfit to perform his duties. He contended that even absent an express provision, the ordinance should be read to prohibit discharge for any other reason, and therefore to confer tenure on all permanent employees.

The Supreme Court, however, disagreed, based on its reading of state law. Said the Court:

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. The North Carolina Supreme Court has held that an enforceable

> expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee....Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question.

426 U.S. at 341. Because the Court agreed with the lower feeral courts that the statute relied upon did not provide such a guarantee, the presence of an entitlement to continued employment was rejected.

Bishop teaches, then, that just as property interests are created by state law, the extent to which proprietary interests arise also is limited by the same law.[2] And, in the present case, state law is fairly unambiguous that no protectable interest in early release arises until actual release. *See State ex rel. Van Curen v. Ohio Adult Parole Authority*, 45 Ohio St. 2d 298 (1976). *See also Wagner v. Gilligan*, F.

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[2]Our purpose here is not to explore whether this principle represents a *de facto* resurrection of the discredited rights-privileges distinction, despite the Supreme Court's protestations to the contrary. *See Morrissey v. Brewer*, 408 U.S. at 481. We do note, however, that Professor Tribe appears to be correct in observing that the

> "view that mere expectations, however reasonable and however demonstrably induced by government, do not amount to interests protected by due process unless they are grounded in explicit rules of state law, is founded on the same notion as the rights-privileges distinction — namely, that what a state may decline to provide at all, it can grant on any terms it chooses."

Tribe, *American Constitutional Law* §10-10 at 524 (1978). We also agree with Tribe's observation that acceptance of the proposition that protection should be provided wherever government invites dependence on certain benefits would require adherence to the notion that the end to which due process is a means is not just that of carrying out the state's own positive choices, but rather that of assuring fairness generally. *Id.* at 526. Whatever its merits, this is not the law as we understand it. *See Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

2d , No. 77-3372 (6th Cir. Nov. 19, 1979). (Ohio Revised Code §2967.03).[3] In short, early release in Ohio is a matter of grace, *Cox v. Maxwell*, 366 F. 2d 765 (6th Cir. 1966), and may be revoked without a hearing anytime before actual release.

On the subject of the nature of the interest involved, we also think it worth noting that the present case is different in several critical respects from one in which actual release has occurred. In *Morrissey v. Brewer, supra*, the decision that a protectable interest had arisen was based in large part on the advantages available to one who actually has been released. Said the Court:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation.

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[3]It should be noted that *State ex rel. Van Curen v. Ohio Adult Parole Authority, supra* (the instant case), was before the Ohio Supreme Court on a petition for a writ of mandamus, and that in Ohio, "[m]andamus lies only to command performance of an action which the law specifically enjoins as a duty resulting from an office, trust, or station." *Id.* at 299, *citing* Ohio Revised Code §2731.01.

408 U.S. at 482. This is, of course, merely an elaboration on the accepted distinction between being deprived of a liberty which one has, and being denied a conditional liberty that one desires. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 99 S. Ct. at 2105. It serves to illustrate, however, that Van Curen's interest in release had not yet arisen to the level of the interest at stake in *Morrissey*. " 'It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.' " *Morrissey v. Brewer*, 408 U.S. at 482 n. 8, *quoting United States ex rel. Bey v. Connecticut Board of Parole*, 443 F. 2d 1079, 1086 (2d Cir. 1971).

In sum, although we have no doubt that the actions of the parole authority in this case worked a grievous loss on the petitioner, this alone is inadequate to trigger due process protections. *Meachum v. Fano*, 427 U.S. 217, 224 (1976).[4]

ORDER

For the foregoing reasons the Court finds that the petitioner had no constitutionally protectable expectation in early release, even under the unusual circumstances presented by this case. The instant petition for a writ of habeas corpus therefore is overruled.

SO ORDERED.

/s/ David S. Porter
UNITED STATES SENIOR DISTRICT JUDGE

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[4]The Court in *Meachum* stated, "We reject at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." 427 U.S. at 224.

NO. 77-3558

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE D. VAN CUREN
Petitioner-Appellant

v.

ARNOLD R. JAGO, Superintendent
Respondent-Appellee.

ORDER

BEFORE: LIVELY and KEITH, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

In our unpublished order in this case, filed June 21, 1978, this court held "the petitioner had an expectation of release on parole at the most and that he had neither a property interest nor a liberty interest which entitled him to a due process hearing on rescission of the earlier decision to grant shock parole." On petition for certiorari the Supreme Court vacated the judgment of this court and remanded for further consideration in light of *Greenholtz v. Inmates of Nebrasks Penal Complex*, 442 U.S. (1979). See 442 U.S. , 47 U.S.L.W. 3797 (June 12, 1979).

We conclude that application of *Greenholtz* requires a determination of whether petitioner, under the peculiar facts of this case, had a protectable entitlement to release under the Ohio shock parole statute, O.R.C. §2967.31; and if such interest did exist, whether he was accorded adequate procedural due process safeguards. These are determinations to be made in the first instance by the district court.

The judgment of the district court is vacated, and the cause

is remanded for further proceedings consistent with this order.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 11, 1979

Louis A. Jacobs, Esq.
Ohio St. Univ. College of Law
1659 North High St.
Columbus, OH 43210

RE: George D. Van Curen v. Arnold R. Jago, Superintendent, Southern Ohio Correctional Facility No. 78-5419

Dear Mr. Jacobs:

The Court today entered the following order in the above-mentioned case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. (1979).

Very truly yours,
MICHAEL RODAK, JR., Clerk
/s/ Michael Rodak, Jr.

NO. 77-3558

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE D. VAN CUREN
Petitioner-Appellant

v.

ARNOLD R. JAGO, Superintendent
Respondent-Appellee.

ORDER

BEFORE: PHILLIPS, Chief Judge; and LIVELY and KEITH, Circuit Judges.

This is an appeal from denial of a petition for habeas corpus. The petitioner, a state prisoner, was selected for "shock parole" at a future date and was so advised. Petitioner then prepared and submitted a parole plan which was never approved. Prior to the date on which he would have been released on shock parole the parole board rescinded its previous decision on the basis of a determination by a parole board investigator that there was a misrepresentation in the petitioner's parole plan and that he had misrepresented the magnitude of his crime at his hearing.

Upon consideration of the briefs and oral arguments of counsel together with the record on appeal the court concludes that the petitioner had an expectation of release on parole at most and that he had neither a property interest nor a liberty interest which entitled him to a due process hearing on rescission of the earlier decision to grant shock parole. The court concludes that *Morrissey v. Brewer*, 408 U.S. 471 (1972), which dealt with the rights of one already free on

parole does not require a decision different from that reached in this case.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. C-1-77-67

GEORGE D. VAN CUREN

Petitioner,

v.

A. R. JAGO, Supt.,

Respondent.

ORDER

This habeas corpus case was submitted on the petitioner's petition (doc. 2), respondent's return of writ (doc. 5), petitioner's reply to return of writ (doc. 7) and the respondent's reply to petitioner's reply (doc. 9).

The matter was referred to the United States Magistrate for report and recommendation pursuant to Western Division Rule No. 1, In re: United States Magistrate, filed June 22, 1977.

The matter is before the Court now on such report and recommendation of the Magistrate.

After consideration, the Court finds the report well reasoned and the recommendation that the petition for writ of habeas corpus be denied is supported by applicable law.

The Court therefore approves and adopts the report of the Magistrate as its own. Accordingly, for reasons set out in the report of the Magistrate, the petition for writ of habeas corpus is hereby denied.

/s/ David A. Porter
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO: C-1-77-67

GEORGE D. VAN CUREN,

Petitioner;

vs.

A. R. JAGO, SUPERINTENDENT,

Respondent.

REPORT OF MAGISTRATE

Inmate George D. Van Curen has filed a petition for writ of habeas corpus seeking to set aside the rescission of his parole on the ground that the rescission violates his constitutional rights. The essential facts are as follows:

After entering a plea of guilty to charges of embezzlement, forgery and uttering and passing forged instruments in the Cuyahoga County Court of Common Pleas, petitioner was sentenced on May 22, 1972 to a term of not less than six nor more than 100 years in the Ohio Penitentiary. In January of 1974, the Ohio legislature enacted O.R.C. §2967.31, which permitted inmates such as petitioner to be considered for shock parole (early parole). A panel consisting of a Parole Board member and a hearing officer interviewed Mr. Van Curen, and on April 17, 1974, granted him shock parole "on or after" April 23, 1974.[1]

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[1]An "on or after" date is used in granting parole since any grant is conditional pending approval and investigation of the parole plan which the inmate must prepare once he is granted parole (Shoemaker, Depo., p. 30).

Presumably the two hearing officers had been impressed with both the information Mr. Van Curen gave them at the hearing and his record. Petitioner had no prior criminal record, had not been disciplined while incarcerated, and had been commended for his performance during 1000 hours of nurse's training at the Correctional Medical Center's James Hospital. Also, he had received a graduate diploma and a high job performance rating as a clerk while in prison, and he had a job waiting upon his release.

He described his crime as the embezzlement of approximately one million dollars and said he had cooperated with attempts to recover the lost funds.

On April 23, 1974, after petitioner had begun the release process but while he was still incarcerated, the Parole Board rescinded its grant of parole. The Board issued special minutes which stated that the "technical matters pertaining to this case should be more fully explored" (Doc. 2, attachment D). The Board did not base its action on information produced by the routine investigation, mentioned above, to which all parolees are subjected before release. In fact, the Board had not received any official report. The record indicates, however, that the Board did receive additional information which caused it to suspect that the decision to grant parole was unsound.

While the Board was in session on April 23, 1974, the Board's absent chairman, Nolan Snyder, telephoned to report he had learned that in the parole plan petitioner had submitted, he had stated falsely that he would be living with his half brother while on parole. Actually, the man named was not related to petitioner at all, although Mr. Van Curen has testified that the sponsor was close to his family. Snyder reported further that the magnitude of petitioner's crime had not been described fully to the original panel (Snyder deposition at p. 31). The amount stolen had been closer to six million dollars than to the one million dollars admitted by petitioner. Snyder also informed the Parole Board that the

trial judge and the prosecuting attorney had protested vigorously the granting of shock parole to petitioner (Snyder deposition at p. 23-4). In addition, Snyder apparently thought the Board should take into consideration the community attitude in the Cleveland area which was against Van Curen's being paroled. The local paper, for instance, had printed articles criticizing the panel's decision, and the Board had received correspondence adverse to petitioner (Doc. 2, p. 5).

The day after the Board tentativey rescinded Mr. Van Curen's parole, he was notified of that action and scheduled to appear before the full Board for a hearing at its June meeting. At that meeting on June 20, 1974, petitioner's shock parole was denied.

In his petition, Mr. Van Curen contends that the actions taken by the Board after granting parole on April 17, 1974 denied him due process of law. He claims that he should have been given a neutral hearing with notice of the topics to be discussed, opportunity to present and confront witnesses and access to the information upon which the Board was relying. He argues that his right to these procedures is grounded in state law and supported by precedent.

The theory that petitioner has a due process interest grounded in state law stems from a Supreme Court decision, *Wolff v. McDonell*, 418 U.S. 539 (1974). In *Wolff*, the Court decided that a prisoner must be given a hearing before being deprived of good time. In doing so, it looked to the state statute which created the right to good time.

The Court noted that:

> The State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct,...[the Due Process Clause requires] that the State created right is not arbitrarily abrogated. 418 U.S. at 556-7.

Thus, where the state establishes statutory rights and a standard for their denial, *i.e.*, "major misconduct," the state must afford the prisoner minimal due process to ascertain whether that standard has, in fact, been violated.

In contrast, the shock parole statute under which Mr. Van Curen tentatively was granted parole does not provide a standard for its recision. Therefore, there exists no state created right to procedural safeguards before he may lose his grant of shock parole. In fact, far from giving the petitioner a definite interest in shock parole which has been granted but not effected, the Ohio legislature has left his status entirely within the discretion of the Parole Board. It is well settled in Ohio that the Pardon and Parole Commission may rescind the granting of parole prior to the time of its taking effect. *Zenz v. Alvis*, 66 Ohio L. Abs. 606, Ohio Appeals, Second District, 1951. Moreover, the word "parole" as used in the statute means the actual release from confinement, *State ex rel Newman v. Lowery*, 61 Ohio L. Abs. 337, aff'd. 157 O.S. 463 (1952). Thus, petitioner's situation does not fall within the reasoning of the *Wolff* doctrine.

Nor do other cases cited by petitioner create a right to a hearing before the Board may rescind his parole. The only appellate level case directly in point which the parties have cited to us, *Sexton v. Wise*, 494 F. 2d 1176 (5th Cir. 1974), is adverse to petitioner. In that case the Court held that a prisoner, who had been granted a future date for parole which was summarily rescinded,

> was not entitled to a hearing since the process of obtaining parole had never reached completion and the due process protections of *Morrissey v. Brewer* [discussed infra] applicable to revocation were not applicable, 494 F. 2d at 1177.

We adopt the reasoning of *Sexton* to decide this case. Recent decisions of both the Supreme Court and the

Court of Appeals for the Sixth Circuit support our holding.

The case most favorable to Mr. Van Curen which bears discussion is *Morrissey v. Brewer*, 408 U.S. 471 (1972). There the Court stated that,

> The liberty of a parolee, although indeterminate...is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal. 408 U.S. at 482.

Morrissey is distinguishable from a case where the parolee has not yet been released. The language used by the Court in *Morrissey* indicates that the distinction is a valid one.

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted

Appeals for the Sixth Circuit recently held that prisoners are not entitled to certain procedural rights before placement in more restrictive security penitentiaries, or before significant and adverse effects. The procedural rights which the Court concluded are unnecessary include the right to written notice of the charges, the right to call witnesses and produce evidence, the right to confront the accusing officer, the right to cross-examine adverse witnesses, the right to a written decision based only upon the evidence produced at the hearing and the right to counsel or counsel substitute in certain situations. *(Walker v. Hughes,* F. 2d , No. 76-1974, June 24, 1977.)

This review of cases discloses that the officials of the prison system may make changes in the status of prisoners within their custody without granting any procedural protection whatsoever. Petitioner Van Curen, therefore, has no remedy in federal court *(Sexton, supra).* For this reason, it is

recommended that the petition for writ of habeas corpus be denied.

J. Vincent Aug Jr.
United States Magistrate

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 15, 1976

Louis A. Jacobs
Ohio State Univ., Law College
1659 North High Street
Columbus, Ohio 43210

RE: George D. Van Curen v. Ohio Adult
Parole Authority, et al. No. 75-6955

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By
Assistant Clerk

THE STATE, EX REL. VAN CUREN v. OHIO ADULT PAROLE AUTHORITY ET AL.

[Cite as State, ex rel. Van Curen v. Adult Parole Authority (1976), 45 Ohio St. 2d 298.]

Mandamus—To compel Adult Parole Authority to recall order—Writ denied, when.

(No. 74-802—Decided March 24, 1976.)

IN MANDAMUS.

Mr. Louis A. Jacobs and *Mr. Stanley K. Laughlin, Jr.*, for relator.

Mr. William J. Brown, attorney general, and *Mr. Thomas D. Ronney*, for respondents.

Per Curiam. On April 17, 1974, relator was granted shock parole by respondent Ohio Adult Parole Authority, to be effective on or after April 23, 1974. Before relator was released from custody, respondent rescinded the action taken on April 17, 1974, and continued the matter of relator's parole for further investigation to June 1974. On June 20, after a hearing, parole was denied.

Relator, who remains incarcerated, now seeks an order of this court to compel respondent to recall its decision of June 20, 1974, and make effective the action taken April 17, 1974.

Relator argues that when respondent granted him parole effective on or after April 23, 1974, an interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution attached to relator and could not be rescinded or continued by respondent without a hearing. This is argued notwithstanding the fact that the grant of parole was rescinded before relator was to be released from confinement.

The Adult Parole Authority has no regulation requiring a

hearing prior to rescinding the grant of a parole before release.

In *State, ex rel. Newman, v. Lowery* (1952), 157 Ohio St. 463, involving a similar fact situation, this court stated that the "* * * [Pardon and Parole] Commission had authority to rescind its order* * *granting a parole effective on or after a future date.* * *"

Mandamus lies only to command performance of an action which the law specially enjoins as a duty resulting from an office, trust or station. R.C. 2731.01. No such duty having been shown, the writ is denied.

Writ denied.

O'NEILL, C.J., HERBERT, CORRIGAN, STERN, CELEBREEZE, W. BROWN and P. BROWN, JJ., concur.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 80-1942

A. R. JAGO, et al.,

Petitioners,

vs.

GEORGE D. VAN CUREN,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A STATE PRACTICE OF RESCINDING PAROLE ONLY UPON A FINDING OF EITHER INTERIM MISCONDUCT OR INABILITY TO IMPLEMENT A RELEASE PLAN CREATES AN INTEREST PROTECTED BY THE DUE PROCESS CLAUSE.

2. WHETHER AN INMATE'S PETITION FOR HABEAS CORPUS RELIEF FROM A DECISION RESCINDING PAROLE WITHOUT DUE PROCESS IS RENDERED MOOT BY HIS PLACEMENT ON CONDITIONAL PAROLE DURING APPELLATE REVIEW.

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STATEMENT OF THE CASE

To correct factual inaccuracies and omissions in the Petition, this brief presentation is submitted pursuant to Sup. Ct. R. 34(2).

Ohio grants parole by setting an "on or after" date for release from incarceration and then leaving to a field investigator responsibility for developing an approved parole plan and establishing the actual release date (Kowalski Dep. at 43; Coomer Dep. at 22-24).* The time needed for investigation varies from a few weeks to several months (Shoemaker Dep. at 31, Coomer Dep. at 42), and the "on or after" date is the earliest possible date and applicable to pro forma situations (Shoemaker Dep. at 14-15, 51-53; Griffith Dep. at 10; Snyder Dep. at 81).

After his parole interview, Mr. Van Curen was given a half-sheet form that stated:

> You have been paroled; effective, on or after April 23, 1974, when arranged: by the Division of Parole.

(A-24).** Outside the interview room, a sign read "If you made parole, report to the parole officer," which Mr. Van Curen did. On a posted list headed "Results of the April 17, 1974 Parole Board," Mr. Van Curen was listed under the heading, "POA [parole on or after] April 23, 1974" (A-25). On April 17, 1974, Mr. Van Curen signed, and the Institutional Parole Officer countersigned as a witness, a "Statement of Parole Agreement" (A-26). The statement began:

> The Members of the Parole Board have agreed that you have earned the opportunity of parole and eventually a final release from your present conviction. The Parole Board is therefore ordering a Parole Release in your case.

(A-26). According to a pamphlet distributed to each incoming prisoner, entitled "You and the Review Process," the answer to the hypothetical question of "If I have a successful review and the Board grants me a parole, how long before I

---

* "Dep." refers to depositions filed in the Supreme Court of Ohio and used throughout the lower federal proceedings.

** "A" refers to the joint appendix filed July 14, 1980, in the Sixth Circuit.

am released?" is "within 30 to 60 days" (A-31).

Mr. Van Curen then attended and completed pre-release classes (Coomer Dep. at 19; Snyder Dep. at 38). He was taken to the prison tailor and measured for a civilian suit of clothes (Coomer Dep. at 17-18, 66-67; Snyder Dep. at 38). The Institutional Parole Officer sent Mr. Van Curen's proposed parole plan to the field investigator (Coomer Dep. at 16-17, 48-50).

Prior to actual release, a parole may be rescinded as "the result of something that occurred between the original parole hearing and subsequent hearing" (Shoemaker Dep. at 65). The practice in Ohio is to rescind parole for institutional misconduct or a problem with developing the parole plan (Coomer Dep. at 32-33, 43-44). Less than one percent of paroles are rescinded annually in Ohio (Snyder Dep. at 73-74; 112-13; Shoemaker Dep. at 14).

Six days after its parole grant, the Board summarily rescinded Mr. Van Curen's parole due to "information that technical matters pertaining to this case should be more fully explored" (A-27). No field investigator's report had been or was ever submitted on the proposed parole plan (Coomer Dep. at 22-24). Mr. Van Curen had not engaged in any improper institutional conduct during the six days (Snyder Dep. at 14).

Prior to the rescission, a deluge of newspaper and broadcast journalists had inquired about the parole grant (Snyder Dep. at 32), and the board chairman related to the other board members that the "community climate appeared to be very hostile to the Board's decision" (Shoemaker Dep. at 27). Adverse publicity was contained in the parole board's file, and one factor in granting parole is the public's reaction: "[I]f the Parole Board gets out of step with public opinion, the future of the Parole Board will be quite hazardous" (Snyder Dep. at 86).

The two grounds for rescission on which the parole authorities now rely involved factual discrepancies. Mr. Van Curen supposedly misrepresented whether six or one million dollars had been embezzled; though, the record is clear that the total loss was over a million dollars (Snyder Dep. at 51, Kowalski Dep. at 57). Mr. Van Curen also listed as a half-brother under whom he would live with his former lover; however, he had submitted a new and recognized place of residence to the Institutional Parole Officer, which the Officer

accepted (Coomer Dep. at 38-39). Mr. Van Curen's family treated the former lover as a half-brother and their relationship was known to Cleveland authorities (Van Curen Dep. at 59). That listing was encouraged by both a prison priest and pscyhologist who advised him to retain the half-brother label to avoid sexual harassment within the institution prior to his grant of parole (Van Curen Dep. at 70-72).

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

1. The Sixth Circuit Followed Controlling Precedent From This Court.

Three legal principles have been established by this Court to govern the due process ramifications at bar. First, a state's custom or practice may create a protectable interest notwithstanding the absence of an express statutory provision. Second, a prisoner's claim must surpass the mere desire implicit to a parole system and amount instead to a justifiable expectation of parole. Third, the parole decision at issue must be one for which due process is viable; consequently, a retrospective factual deliberation must be done with notice and an opportunity to be heard while a purely subjective prediction may be done summarily. Each of these principles are clearly satisfied in this case.

A. State Custom or Practice May Create A Protectable Interest.

The argument petitioner makes concerning Ohio's statutory parole framework is off the constitutional mark because due process interests may be created by state custom or practice. Perry v. Sindermann, 408 U.S. 593, 601, (1972). Where a state establishes "rules or mutually explicit understandings," Perry, 408 U.S. at 601, regarding a benefit, a due process interest can be created even absent statutory expression.

The federal courts are not in conflict on this issue. See, e.g., Mitchell v. Hicks, 614 F.2d 1016, 1019 (5th Cir. 1980); Cofone v. Manson, 594 F.2d 934, 939 (2d Cir. 1979); Arsberry v. Sielaff, 586 F.2d 37, 46 (7th Cir. 1978).

Ohio has created precisely such an interest through both its nearly unvariable practice of effectuating parole grants and its use of rescission only for cause. The state has buttressed that practice through its parole agreement, pamphlet, and process, all of which combine here to produce a mutually explicit and undeniable understanding.

B. Mr. Van Curen Had Been Granted A Benefit He Could Justifiably Anticipate Receiving.

The facts demonstrate that Mr. Van Curen did not just desire parole in the same undifferentiated way all prisoners do. He did not expect parole simply because a parole system implicitly holds out that prospect. Thus, unlike Greenholtz v.Nebraska Inmates, 442 U.S. 1, 11 (1979), Mr. Van Curen had "more than the mere hope that the benefit will be obtained," he had documents countersigned by the authorities, official minutes, and a half-sheet, and completion of the process from the tailor's measurements to pre-release classes, needed to implement a parole grant.

His expectation for parole was, therefore, rooted in Ohio's representations and actions. He had attained a status that Ohio held out as a special one to be given only to deserving inmates. See "You and The Review Process," A-28-32. Mr. Van Curen could justifiably rely on the documentation, interviews, and efforts undertaken by him and the authorities to implement the parole grant.

This case differs, therefore, from Connecticut Bd. of Pardons v. Dumschat, No. 79-1997 (U.S., orally argued Feb. 24, 1980), which raised the issue of whether the existence of statistically frequent accelerations of parole operates to create a protected interest. Here, an individual granted a status asks only that it not be taken away without at least some notice and an opportunity to be heard. In Dumschat, the argument raised in Greenholtz is renewed: whether mere existence of a system creates a protected interest for all inmates.

C. The Decision To Rescind Parole Is Factually Retrospective, In Contrast To The Decision To Grant Parole, And Is Thus Amenable To Due Process.

Two separate decisions were made by the Ohio parole board. First, it summarily rescinded on April 23, 1974, Mr. Van Curen's parole. Then, at a later and different hearing, it decided on June 20, 1974, not to grant parole. (Petition at 5-6.)

The decision to deny parole "is necessarily subjective in part and predictive in part" with "very broad discretion in the Board." Greenholtz, 442 U.S. at 13. But, the decision to rescind parole in Ohio "involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of "institution rules or failed to present a proper release plan." Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

However amenable to due process the totally discretionary exercise of granting power may be, the exercise of rescinding power is too intrisically based on an intervening occurrence or information to be totally discretionary. Ohio must provide the process that is due once it grants parole.

2. Conditional Parole Represents A Restraint By Government That Is Subject To Habeas Corpus Relief.

At oral argument on this matter before the Sixth Circuit Court of Appeals, the Court was informed that Mr. Van Curen was conditionally released on parole. (Petitioner's Appendix, 6A). Petitioner then and before this Court asserts that Van Curen's case is therefore moot due solely to respondent's parole status relying upon this Court's decision in Weinstein v. Bradford, 423 U.S. 147 (1975). The Sixth Circuit replied to petitioner's argument stating:

> [T]he fact which created mootness [in Weinstein v. Bradford] was not the inmate's release. Rather, the case became moot when this status 'ripened into a complete release from supervision...' Id. at 148. Since Van Curen remains under the supervision of the OAPA the present case is not controlled by Weinstein. We conclude that mootness has not been established and that the important constitutional issue presented by this appeal should be decided at this time. (Petitioner's Appendix, 6A).

The Court of Appeals again considered petitioner's assertion of mootness in denying petitioner's request for rehearing en banc. (Petitioner's Appendix, 17A).

Mr. Van Curen has not met the threshold requirement of a final unconditional release from parole that this Court found in Weinstein made it "plain that respondent can have no interest in the procedures followed by petitioners in granting parole." Weinstein, 423 U.S. at 148. Respondent Van Curen's interest in petitioner's parole procedure is a consuming one, he presently lives under the daily supervision of the State of Ohio, a supervision continually reinforced by the significant and special restraints placed upon his liberty while on parole. (Respondent's Affidavit In Support of Request To Proceed in Forma Pauperis).

In Jones v. Cunningham, 371 U.S. 236, 252 (1963), this Court recognized the significant effect parole conditions placed upon one's liberty in finding that parole did moot a petition for a writ of habeas corpus. In ruling a parolee's habeas action not to be moot against the exact question of mootness the petitioner here presents, the United States District Court in Hutton v. Heggie, 454 F.Supp. 870, 873 (D.Col. 1978), found the Jones

court's explanation of the rationale historically inherent in the habeas writ to be persuasive:

> Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose--the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

Jones, 371 U.S. at 243.

Petitioner's reliance upon the "issue capable of repetion, yet evading review" test first enunciated by this Court in Southern Pacific Terminal Co. v. I.C.C., 299 U.S. 498 (1911), is therefore misplaced. Respondent's personal stake in the outcome of this action was clearly recognized by the Court in Jones, supra, and is not comparable to the factual setting present in Weinstein, supra. Respondent Van Curen's ongoing personal stake in his due process challenge to the State of Ohio which the Sixth Circuit has confronted is further evidenced by this Court's recognition that 35-45% of all paroles are revoked. Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

In petitioner's final assertion of mootness, petitioner states "Van Curen has obtained his relief." (Petition, 11). Respondent Van Curen can never gain all the relief entitled him. A due process hearing in 1974 may have resulted in Van Curen's release on parole six years before his ultimate parole date.

The relief Mr. Van Curen is entitled to on a writ of habeas corpus in these circumstances is immediate release from parole. Hutton, 454 F.Supp. at 875. Federal courts have the "power to fashion appropriate relief other than immediate release" from incarceration upon a habeas corpus petition. Peyton v. Rowe, 391 U.S. 54, 67 (1968). Petitioners request that this Court find Van Curen's case moot thereby implicitly suggests that all the state of Ohio need do in future habeas challenges to the parole system is wait until the last stage of appeal before ordering parole for the habeas inmate and thereby successfully evade review. Based upon the importance of the issue and fairness to the respondent, mootness is highly improper to invoke. Recognizing the ultimate importance of the decision for the State of Ohio, petitioner requested a stay of the Sixth Circuit decision pending this Court's decision. (Petitioner's Appendix 16 A). The effect of that stay was to block the very relief sought: release from the restraint of conditional parole.

CONCLUSION

Rescission of parole under the circumstances at bar constitutes the deprivation of a benefit that the state had provided. There is no conflict in the federal courts and no departure from this Court's precedent in the Sixth Circuit's holding that Ohio has adopted a custom and practice of rescinding parole only for cause. Mr. Van Curen had progressed beyond the level of other prisoners, he had even been measured for his civilian suit. Consequently, he had a right to some notice and opportunity to be heard.

Were the Sixth Circuit affirmed and the stay lifted, Mr. Van Curen would immediately seek release from parole. That release is the appropriate remedy under habeas corpus in the situation presented by this case. Far from being moot, that release is one in which Mr. Van Curen has an ongoing personal stake: he wants to have and should be provided unconditional liberty.

For these and the foregoing reasons, the petition should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

RECEIVED
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Case No. 80-1942

A. R. JAGO, et al.,

Petitioners,

vs.

GEORGE D. VAN CUREN,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Respondent George D. Van Curen, by and through his attorneys, moves this Court, pursuant to Sup. Ct. R. 46(1), for leave to proceed in forma pauperis for the reasons stated in the attached affidavit. Respondent sought and was granted leave to so proceed in the federal appellate and district courts below, in this Court in Misc. No. 78-5419, and in the Supreme Court of Ohio.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 80-1942

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to the United States Court of Appeals
for the Sixth Circuit

RESPONDENT'S AFFIDAVIT IN SUPPORT
OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF OHIO
COUNTY OF CUYAHOGA, SS:

I, George D. Van Curen, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to pay costs or fees:

1. I am the respondent in the above-captioned case.

2. I am on parole upon a two-year term until April 11, 1982, even though in Ohio the term for parole upon convictions for others than homicide is generally one year, under the following conditions:

(a) a written travel permit is required for out-of-state or more than 24 hours away trips and for visits back to the prison

(permission has been denied for one such trip), which permit local law enforcement authorities must check-off on at the destination;

(b) permission must be given to change residence or jobs;

(c) no checking account, according to the District Supervisor of the Ohio Adult Parole Authority may be maintained;

(d) a monthly visit to my parole office for an interview and report must be made; and

(e) any misconduct during this term may lead to revocation.

3. I have no substantial assets and a savings account with only Five Dollars ($5.00) in it that must be maintained so that I can cash my paycheck.

4. I am a cleaner full-time at Lakewood High School and take home approximately One Hundred Fifty Dollars ($150) a week.

5. I had an offer of an out-of-state job for a higher salary but did not apply to the Parole Authority for permission because the job involved working on films the Authority would surely find morally objectionable.

6. I have been unable to find a higher paid job that the Authority would deem suitable.

7. For my job I must have a car and owe the credit union Fifteen Hundred Dollars ($1,500) on it.

8. I pay a monthly rental of Two Hundred Dollars ($200) for an apartment.

9. I am responsible for my own support and pay for gasoline, food, insurance, clothing, and other necessities.

10. The United States Treasury Department has a Nine Hundred Eighty One Thousand Dollars ($981,000) tax lien on me and took my refund check this year in partial payment.

11. Because of my financial situation, I am unable to pay the costs or fees for pursuing this case.

12. I am unable to post security either.

13. I believe I am entitled to the redress approved by the Sixth Circuit because parole authorities should not be allowed to

take back in summary fashion a parole release date I justifiably relied on using, particularly when their action was taken based on facts that I could have cleared up given the chance to be heard.

FURTHER AFFIANT SAITH NOT.

George D Van Curen

George D. Van Curen

Sworn to and subscribed before me this 11th day of June, 1981.

Louis A. Jacobs

NOTARY PUBLIC

LOUIS A. JACOBS, Attorney-At-Law
NOTARY PUBLIC — STATE OF OHIO
My Commission has no expiration date.
Section 147.03 R.C.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 80-1942

A. R. JAGO, et al.,

Petitioners,

vs.

GEORGE D. VAN CUREN,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Proceed In Forma Pauperis and Affidavit in Support has been deposited in a United States Postal Service mailbox, in an envelope with first-class postage prepaid, addressed to Dennis L. Sipe, Counsel of Record for Petitioner, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio, 43215, this 11th day of June, 1981. I further certify that all parties required to be served have been served by mailing that copy to their counsel as indicated above.

Louis A. Jacobs

LOUIS A. JACOBS
Counsel of Record